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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

PENNCO, INC. - - - - - - - Petitioner

versus

NATIONAL LABOR RELATIONS BOARD - Respondent

On Writ of Certiorari to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

GREGORY L. MONGE
VANANTWERP, HUGHES, MONGE & JONES
1416 Winchester Avenue
P.O. Box 1111
Ashland, Kentucky 41101
606/329-2929
Attorneys for Petitioner

May 12, 1982

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3291, LOUISVILLE, KY.

QUESTIONS PRESENTED

1. Where the Petitioner permanently replaced all striking employees, hired additional employees during the pendency of an economic strike and such replacement employees and newly hired employees crossed a picket line continuously which was the scene of numerous acts of violence resulting in a State Court issuance of a restraining order, is not the holding by the National Labor Relations Board as affirmed by the United States Court of Appeals for the Sixth Circuit that Petitioner engaged in an Unfair Labor Practice in violation of 29 *U.S.C.* 158(a), (1) and (5) when it withdrew recognition of the Communications Workers of America on the basis that it had a good faith doubt as to that union's continued representation of a majority of its employees in error?
2. When the Petitioner has demonstrated enough evidence to put the Petitioner in equipoise as suggested by the United States Court of Appeals for the Sixth Circuit has not the Petitioner satisfied its burden of proof sufficient to shift the burden of going forward to the National Labor Relations Board to prove that on the critical date the union still represented a majority of the employees of Petitioner?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No.

PENNCO, INC. - - - - - *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, Pennco, Inc.,[1] prays a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit entered on March 16, 1982 which Judgment and opinion became final upon denial of a Motion for Rehearing by that Court on April 8, 1982.

OPINIONS BELOW

The final judgment and opinion of the United States Court of Appeals for the Sixth Circuit was entered on March 16, 1982 and appears in the Appendix hereto. App. A, pp. 19-23. The denial of and the opinion upon the Petition for Rehearing to the United States Court of Appeals for the Sixth Circuit entered on April 8,

[1]Pennco, Inc., is a Kentucky corporation which has no subsidiaries or affiliates nor is it owned by any other corporation.

1982 appears in the Appendix hereto. App. B, p. 24. The original decision and order of the National Labor Relations Board dated May 23, 1979 appears in the Appendix hereto. App. C, pp. 25-39. The supplementary decision and order of the National Labor Relations Board dated July 18, 1980 appears in the Appendix. App. D, pp. 40-48.

JURISDICTION

The final judgment and opinion of the United States Court of Appeals for the Sixth Circuit in this matter was entered on March 16, 1982. A timely Petition for Rehearing was denied on April 8, 1982. This Petition is filed within ninety (90) days of March 14, 1982 and of April 8, 1982. Jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

United States Code

National Labor Relations Act §158 (29 U.S.C. §158(a) (1) and (5)): Set out at Appendix E, pp. 49-50.

STATEMENT OF THE CASE

This matter is a request for relief from the final opinion and order of the United States Court of Appeals for the Sixth Circuit.

In the matter at bar the Petitioner, Pennco, Inc., (hereinafter referred to as "Pennco") was petitioned by the Communications Workers of America (herein-

after referred to as "CWA") seeking to represent an appropriate bargaining unit of Pennco employees. As the result of an election held October 21, 1976 CWA was certified by the National Labor Relations Board as the collective bargaining representative for the Pennco employees. That certification was based upon the winning of the election by the CWA 114 votes to 62 votes.

Shortly after November 1, 1976 collective bargaining was begun and continued through November 1, 1977. The stipulated record before the National Labor Relations Board indicated that numerous sessions were held prior to the intervention of the Federal Mediation and Conciliation Service and that subsequent to April 4, 1977, further sessions were held with the assistance of the Federal Mediation and Conciliation Service.[2]

Even though good faith bargaining was engaged in by Petitioner and by CWA, no collective bargaining agreement was reached between Pennco and CWA prior to the expiration of the one-year certification.[3]

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[2]The stipulated record filed below indicated that negotiating and bargaining sessions were held prior to the intervention of the Federal Mediation and Conciliation Service on seven occasions and subsequent to intervention with the assistance of the Service on five further occasions, the last being September 21, 1977.

The stipulated record below further indicates that on May 18, 1977 CWA and its employees commenced an economic strike at the production facility of Pennco. An attendant picket line was established and the strike and picket line continued through and including September 15, 1978 at which time CWA announced the termination of the strike.

[3]Pennco, Inc. has not quarreled with nor does it argue the principle that CWA was presumed to represent a majority of its employees during the one-year period from the date of certification.

Subsequent to the inception of an economic strike on May 18, 1977, Pennco sent notices to those striking employees that if they did not report to work they would be permanently replaced. Of the persons on strike 109 were so replaced.[4]

As indicated by the stipulated facts, the picket line was established May 18, 1977 and was present throughout the summer, fall and winter of 1977. During that time all of those persons on the payroll of Pennco after the strike began had to cross that picket line to report for work. The stipulated record indicates that there were incidents of violence and mass picketing that occurred between the date of May 18, 1977 and the issuance by the Boyd Circuit Court of Kentucky of a restraining order restraining numbers of pickets and prohibiting acts of violence on July 18, 1977.[5]

Pennco, in the meantime, continued to negotiate as it was required to do by the previous decisions of this Court and the National Labor Relations Act. During

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[4]Immediately prior to the strike the stipulated facts show that there were 173 bargaining unit members in the employment of Pennco and on the active payroll. 109 of those were permanently replaced and 62 crossed the picket line and returned to work. On June 11, 1977, the next pay period mentioned in the stipulated facts subsequent to the strike, there were 191 persons currently on the active payroll, i.e. employees actively working. This indicated that as of that date there were 191 persons crossing the picket line that was in existence.

[5]The verified complaint which was stipulated below indicated that there were numerous incidents of violence which caused both property damage and personal injury. The Boyd Circuit Court upon that basis issued its restraining order on July 18, 1977 limiting the number of pickets, prohibiting mass picketing at Petitioner's production facility and prohibiting further acts of violence.

that same time, Pennco increased its employee complement so that on November 3, 1977, a pay period stipulated to be immediately after the expiration of the one-year certification, Pennco had on its active payroll, i.e. employees actually working, 257 persons. Of these 257 employees only 47 had been on the payroll prior to the strike of May 18, 1977 and of those 47 only 28 had been employed on the date of the election, i.e. October 21, 1976. That number represented only slightly over 15 percent of those who had participated in that election in 1976. Based upon the number of employees replaced, the incidents on the picket line and the fact that the replacement employees and new employees had continued to cross the picket line and to perform production services for Pennco, the Petitioner herein refused to bargain further with CWA after one year elapsed on the grounds that it had a good faith doubt that the CWA continued to represent a majority of Petitioner's employee complement.

Subsequent thereto, the National Labor Relations Board filed Unfair Labor Practice charges against Petitioner alleging that the refusal to bargain was in violation of 29 U.S.C. §158(a), (1) and (5).[4] This was the only Unfair Practice charge filed with respect to the bargaining.

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[4]The Board further indicated that there was a failure to furnish a copy of a health insurance plan. It was stipulated at the hearing that if the Board and the Courts subsequently affirm the position of the National Labor Relations Board that the plan would be furnished.

The parties at a hearing on October 18, 1978 entered into a stipulated set of facts which were then submitted to the National Labor Relations Board. The Board issued an original decision on May 23, 1979. App. C, pp. 25-39. However, on its own motion, the Board decided to reconsider that decision and withdrew same requesting additional stipulated facts which were provided. Thereafter the Board rendered its second decision on July 18, 1980. App. D, pp. 40-48.

The holdings of the National Labor Relations Board found the Petitioner herein to be in violation of the National Labor Relations Act and of the commission of an Unfair Labor Practice. Notably the Board indicated:

> That an employee's return to work during a strike does not provide a reasonable basis for presuming that he has repudiated the union as his bargaining representative. Absent supporting evidence it may mean no more than that he was forced to return to work for financial reasons or that he did not support that particular strike. Similarly, the Board, with Court approval, has held that a replacement hired for a striking employee cannot, without more, be presumed to reject the union as his bargaining representative. Such a worker also may be compelled to seek employment, or may disapprove of the strike in question but would support other union initiatives. Thus, in light of this uncertainty as to the reasons employees cross a picket line, Respondent's presumption alone is clearly not sufficient to rebut the presumption of majority status nor its corrollary that new em-

ployees, including strike replacements are presumed to support the union in the same ratio as those they replaced.

Board decision App. D, pp. 40-48.

Thereafter, the Board moved for an enforcement order from the United States Court of Appeals for the Sixth Circuit. That Court granted enforcement of the Board's order but did not agree with the precise Board holding below with respect to the presumptions of representation. The Court indicated that: "Instead, under the facts of this case, the evidence demonstrated by Pennco is sufficient only to put the parties in equipoise." — F. 2d at p. — (1982) App. A, pp. 19-23. The Court went on to indicate that "We leave to another day the case where picket line violence occurs close to the date of withdrawal." —— F. 2d at p. —— (1982). App. A., pp. 19-23.[7]

The Petitioner herein then filed a timely motion for reconsideration which was denied on April 8, 1982, App. B, p. 24, and then filed a timely motion pursuant to Federal Rules of Appellate Procedure 41(b) and United States Court of Appeals for the Sixth Circuit Rule 15(b) for a stay of the mandate pending this Petition for Writ of Certiorari to the United States Supreme Court. That motion was granted on April 16, 1982 staying the mandate of the United States Court of Appeals for the Sixth Circuit to and including the 16th day of May, 1982. App. F., p. 51.

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[7]The Court will observe that the picket line violence resulted in the issuance of the restraining order on July 18, 1977 and withdrawal of recognition occurred subsequent to November 3, 1977.

REASONS FOR GRANTING THE WRIT

I.

The National Labor Relations Board in Finding Petitioner in Violation of 29 U.S.C. 158(a)(1)(5) When Petitioner Withdrew Recognition of the Communication Workers of America by Applying to the Instant Case the Presumption That Striker Replacements and New Employees are Presumed to Support the Union in the Same Ratio as Those Whom They Have Replaced and the Subsequent Affirmation by the United States Court of Appeals for the Sixth Circuit of the Holding of the Board are Clearly Erroneous Where Such Employees Were Subjected to Violence, Harassment and Had to Cross a Picket Line to Work Each Day.

The National Labor Relations Board in its decision below asserted that the mere hiring of a number of new employees and replacements was meaningless inasmuch as the Board has long held that new employees are presumed to support the union in the same ratio as those whom they have replaced. *Laystrom Manufacturing Company,* 151 NLRB 1482 (1965) (enforcement denied on other grounds) 359 F. 2d 799 (7th Cir. 1966). The Court of Appeals for the Sixth Circuit, however, indicated that: ". . . We expressly decline to adopt either presumption for neither is justified under this set of stipulated facts." —— F. 2d ——, (1982). App. A, pp. 19-23.

What the Circuit Court indicated was that inasmuch as the picket line violence had ended some three and a half months prior to the withdrawal of recognition, they would not attribute to those who crossed the picket line any anti-union animus on the date of withdrawal

of recognition, i.e. November 3, 1977. The Court indicated through that: "We leave to another day the case where picket line violence occurs close to the day of withdrawal ___ F. 2d ___, (1982). App. A, pp. 19-23.

The Court in spite of its continued adherence to the decision of the National Labor Relations Board in *Stoner Rubber Company,* 123 NLRB 1440 (1959), and the principles set up therein, went on to enforce the order of the Board thus departing from its prior decisional law. The Court had previously adopted the reasoning of the Board in *Stoner Rubber Company* in its decision in *Automated Business Systems* v. *NLRB,* 497 F. 2d 262 (6th Cir. 1974) and had continued to adhere to that decision as shown in *NLRB* v. *Triplett Corporation,* 619 F. 2d 586 (6th Cir. 1980).

Stoner as in the instant case, clearly indicated that where a strike was in progress for some five months prior to the time of withdrawal of recognition, where no unfair labor practices were occurring and where permanent replacements for strikers and 18 former strikers were crossing a picket line to return to work it was not unreasonable to assume that those early returning strikers and replacements were not adherents of the union. Such reasoning was adopted in *Automated Business Systems, supra,* at 270-71. The Court here however in holding that Pennco was not entitled to rely upon the replacement of strikers, the violence that they were subjected to and the continued crossing of the picket line by those employees as any evidence of anti-union animus on the part of its complement of employees clearly departed from its holding in

Automated Business Systems and totally ignored the realities of the strike situation! The United States Court of Appeals for the 8th Circuit in *National Car Rental System, Inc.* v. *NLRB,* 594 F. 2d 1203 (1979) in quoting from R. Gorman, *Labor Law* 112 (1976) summed up the situation here quite precisely in stating:

> If a new hire agrees to serve as a replacement for a striker (in union parlence, a strike breaker, or worse) it is generally assumed that he does not support the union and that he ought not be counted toward a union majority. 594 F. 2d at 1206.

That statement sets forth the realities of the picket line and striker replacements that was present here. The strikers' replacement presumption cannot be justified by the rationale of the new employee presumption because the replacements and persons crossing a picket line did provide a reasonable basis for Pennco's good faith doubt of CWA's majority support!

As the record of this case currently stands, if this Petition for Writ of Certiorari is denied and Petitioner is not granted the relief sought, it will be in the position of having to bargain with a union whose members went on strike and were replaced by the Petitioner's current complement of employees who were subjected to violence, harassment and the continued presence of a picket line while performing employment services for the Petitioner! Clearly the first goal of CWA will be to cause the termination of the replacements and the reinstatement of the strikers! Accordingly, as the facts of this case do not indicate nor war-

rant the finding of an Unfair Labor Practice in the withdrawal of recognition under these circumstances this Court should grant the Petition for Writ of Certiorari.

II.

Where the Petitioner, Pennco, Inc., Demonstrated Enough Evidence to Put the Parties in "Equipoise" as Suggested by the Opinion of the United States Court of Appeals for the Sixth Circuit, the Petitioner Has Demonstrated Sufficient Evidence to Shift the Burden of Going Forward to the General Counsel for the National Labor Relations Board to Show That on the Date of Withdrawal, the Union Did in Fact Represent a Majority of Petitioner's Employees.

The Court below indicated that Pennco had demonstrated evidence on the record to put the parties in "equipoise." App. A, pp. 19-23. The Court, however, indicated that Pennco: "Would need some further evidence of union non-support in order to shift the burden to the Board to prove the union in fact had majority status on the critical day." App. A, pp. 19-23. This is a departure from previous holdings that followed the reasoning of the National Labor Relations Board as set out in *Stoner Rubber Company, supra,* to which the United States Court of Appeals for the Sixth Circuit had previously adhered. Particularly important is the holding in *Stoner Rubber Company* that:

> Proof of majority is peculiarly within the special confidence of the union. It may be proved by signed authorization cards, dues check-off cards, membership lists, or any other evidentiary means.

> An employer can hardly prove that a union no longer represents the majority since he does not have access to the union's membership list and direct interrogation of employees would probably be unlawful as well as of dubious validity. Accordingly, to overcome the presumption of majority, the employer need only produce sufficient evidence to cast serious doubt on the union's continued majority status. The presumption then loses its force and the General Counsel must come forward with evidence that on the refusal to bargain date, the union in fact did represent a majority of the employees in the appropriate unit. See *Automated Business Systems Inc.* v. *NLRB*, 497 F. 2d at 270-71 quoting from *Stoner Rubber Company, supra.*

That is precisely the situation that Pennco found itself in! That is to say, that where Pennco had replaced strikers and witnessed the events on the picket line that the strike replacements and new employees were subjected to, these events demonstrated sufficient evidence to put the parties in equipoise. Therefore, since the General Counsel had access to facts that lie peculiarly within the knowledge of the union, he should have been required to go forward to show that on the critical date the union did represent a majority of Pennco employees. To so hold clearly would not provide a vehicle for the employer to "break the union" because, if in fact the General Counsel does go forward and proves a majority status then the employer no longer has any basis to doubt the majority status of the union and under prior decisional law must bargain for a reasonable period of time thereafter. *Rogers Manu-*

facturing Company v. *NLRB*, 487 F. 2d 644 (6th Cir. 1973).

Further this would have eliminated any question at all as to whether or not the interest of the replaced employees was, as indicated by this Court in *NLRB* v. *Fansteel Metallurgical Corporation*, 306 U. S. 240 (1939) and set out by the National Labor Relations Board in *Beacon Upholstery Co., Inc.*, 226 NLRB 207, 1976-77 CCH NLRB 29,159 (1976) "diametrically opposed to those of the strike replacements." For, as said by the Board in *Beacon Upholstery:*

> The interest of the discharged employees was diametrically opposed to those of the strike replacements. If the discharged employees return to work, the strike replacements would loose their jobs. Respondent was well aware of the situation and serious argument can be made that Respondent does have a reasonable basis for doubting that the strike replacements want the union to represent them. CCH NLRB at 29,162.

Had the Board gone forward and shown an actual majority on the date in question by use of the facts peculiarly within the knowledge of the union and the Board, no question could be raised.

That the Court below recognized that Pennco had placed this case in equipoise would, under the decision in *Soule Glass and Glazing Co.* v. *NLRB*, 652 F. 2d 1055 (1st Cir. 1981) be sufficient to shift the burden to the General Counsel. As stated by the Court in *Soule*: "Absent countervailing factors or the operation of some doctrine of estoppel, this objective numerical

factor alone is sufficient to support the company's withdrawal of recognition the union." 652 F. 2d at 1111.

No such estoppel or countervailing factors were present here!

Accordingly, as the opinion of the United States Court of Appeals for the Sixth Circuit shows Petitioner did demonstrate evidence to place the parties in "equipoise" the Court's opinion enforcing the Board's order is clearly erroneous and in violation of law and this Court should grant this Petition for Writ of Certiorari.

III.

Review Is Necessary to Clarify and Resolve Conflicts Between the Opinions of Four Federal Circuit Courts on the Issue of the Replacement of Strikers as That Relates to the Good Faith Doubt of an Employer as a Basis for Withdrawal of Recognition After the One Year Certification Period.

The National Labor Relations Board has held that, in the absence of objective evidence to the contrary, it is presumed that employees support a union in the same ratio as those they have replaced and that a high rate of turnover among current employees in both strike and non-strike situations will not alone provide a basis for an employer asserting a good faith doubt as to the union's continuing majority. See *Windham Community Memorial Hospital,* 320 NLRB 1070 (1977). The Second Circuit agreed with this position in its decision enforcing *Windham. NLRB* v. *Wind-*

ham Community Memorial Hospital, 577 F. 2d 805 (2d Cir. 1978). The United States Court of Appeals for the Fifth Circuit in *NLRB* v. *Randall Eastern Ambulance Service, Inc.*, 584 F. 2d 720 (1978) and the Eighth Circuit in *National Car Rental System, Inc.* v. *NLRB*, 594 F. 2d 1203 (1979) have indicated their disagreement with this position and have held that it is unwarranted and unrealistic to engage in that presumption where the crossing of a picket line is involved.

In *National Car Rental System, Inc., supra*, National contended that it had a good faith doubt of the union's majority status based upon the following:

a. The company had only ten employees and all of those employees had been permanently replaced during an economic strike.
b. Each of the ten employees had to cross the picket line in order to make application for employment.
c. Each of the ten employees had to cross the picket line each day in order to work.
d. There was no showing at the hearing that the new employees were contacted by the union regarding their membership therein; and no showing that any of the new employees would support the union.

The Board presented no evidence directly bearing upon whether the union still had majority status relying upon the Board created rule set forth in a case decided by the Board after National notified the union of the good faith doubt of continued majority representation . . . 594 F. 2d at 1206.

The Eighth Circuit in denying enforcement of the Board's order stated that:

> If this presumption were to be employed here, we would reach the ridiculous result of presuming that all of the ten new employees favor representation by the union even though they crossed the union's picket lines to apply for work and to report to work each day after they were hired. This presumption of the Board is not specifically authorized by statute and is so far from reality in this particular case that it does not deserve further comment . . . 594 F. 2d at 1206.

The United States Court of Appeals for the Fifth Circuit in *NLRB* v. *Randall Eastern Ambulance Service, Inc.*, 584 F. 2d 720 (1978) stated in setting out its position:

> At the commencement of this strike, March 31, the bargaining unit numbered 177, of whom 166 joined the strike. By June 7, however, the company was possessed of three items of objective evidence that, considered collectively, supported its doubt of the union's continued majority support.
>
> First, 46 of the original strikers had returned to work, and 10 had requested reinstatement and were on a preferential hiring list . . .
>
> Second, the company had hired 47 permanent replacements, of whom 6 had indicated disinterest in the union or had been the victims of picket line violence . . .
>
> If a new hire agrees to serve as a replacement for a striker (in union parlence, a strike breaker, or worse), it is generally assumed that he does not

> support the union and that he ought not to be counted toward a union majority . . . 584 F. 2d at 728.

Supporting this position is also the decision of the United States Court of Appeals for the First Circuit in *Soule Glass and Glazing Co.* v. *NLRB,* 652 F. 2d 1055 (1981) wherein that Court held that:

> Although mere high employee turnover is not a sufficient ground to negate a union's presumed majority status, the permanent replacement of striking employees presents a different situation. Striker replacements are: "generally assumed . . . not [to] support the union and . . . ought not to be counted toward union majority. When such strike breakers or permanent replacements constitute a majority of the unit, the presumption of the union majority is undermined." *Titan Metal Manufacturing Co.,* 135 NLRB 196 (1962). But in computing the total work force within which the majority is to be determined, the replaced economic strikers must be counted, at least during the first 12 months . . . 652 F. 2d at 1110.

There appears, as shown above, to be a disparity of opinion on this issue between the Circuit Courts because as stated in *Windham, supra,* "it cannot be presumed that the repudiation of the strike or the willingness to cross a picket line is also repudiation of the union as a bargaining agent . . ." 577 F. 2d at 814. The United States Court of Appeals for the Sixth Circuit in the instant case has, at least impliedly, sided with the Second Circuit position in *Windham* by granting an enforcement of the Board's order here.

Accordingly, it is appropriate for this Court to grant the Petition for Writ of Certiorari so that the conflict of opinions between the Federal Circuit Courts can be finally resolved by this Court.

CONCLUSION

For any one, or all of the reasons set forth above, minimally, a Writ of Certiorari should be granted by this Court.

Respectfully submitted,

GREGORY L. MONGE
VANANTWERP, HUGHES, MONGE & JONES
1416 Winchester Avenue
P.O. Box 1111
606/329-2929

Attorneys for Petitioner